

V.G., Appellant

**DEPARTMENT OF THE AIR FORCE,
HILL AIR FORCE BASE, UT, Employer**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

Before:

ALEC J. KOROMILAS, Chief Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

On August 20, 2020 appellant, through counsel, filed a timely appeal from a May 27, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).² The Clerk of the Appellate Boards docketed the appeal as No. 20-1526.³

On February 6, 2018 appellant, then a 57-year-old management assistant, filed a traumatic injury claim (Form CA-1) alleging that on December 28, 2017 she injured her wrist, knees, and the side of her face when she tripped and fell on an uneven sidewalk while in the performance of

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² Appellant, through counsel, did not appeal OWCP's May 28, 2020 and July 2, 2020 decisions denying a request for surgical authorization. Therefore, these decisions are not before the Board on this appeal. *See* 20 C.F.R. § 501.3.

³ The Board notes that following the May 27, 2020 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

duty. OWCP accepted the claim for closed fracture of the left distal radius, bilateral knee contusions, and a contusion to the left side of the face.

On January 3, 2018 Dr. Christopher S. English, a Board-certified orthopedic hand surgeon, performed an authorized open reduction and internal fixation of the left distal radius fracture. In a report dated June 25, 2018, he indicated that appellant had reached maximum medical improvement (MMI).

On July 27, 2018 OWCP referred appellant, the medical record, and a statement of accepted facts (SOAF) to Dr. John Ballard, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion on permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ In his September 12, 2018 report, Dr. Ballard noted his review of the medical evidence of record and the SOAF. He opined that appellant had reached MMI. Dr. Ballard found three percent impairment for left wrist flexion at 70 degrees, and one percent impairment for left elbow supination limited to 65 degrees, resulting in four percent permanent impairment of the left upper extremity. He found no impairment of either lower extremity.

On November 29, 2018 OWCP routed the medical record and SOAF to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as district medical adviser (DMA). In a December 2, 2018 report, Dr. Katz utilized the diagnosis-based impairment (DBI) method. He referenced Table 15-3 (Wrist Regional Grid), page 396, to find a class 1 impairment for left wrist fracture, with a default value of three percent. Dr. Katz noted a grade modifier for functional history (GMFH) of 2 and a grade modifier for physical examination (GMPE) of 1. Application of the net adjustment formula resulted in an adjustment of +1, raising the default value to four percent. Dr. Katz opined that the DBI method was preferable to the range of motion (ROM) rating method.

On August 27, 2019 appellant filed a claim for a schedule award (Form CA-7). She provided a July 15, 2019 report by Dr. Thomas L. Gritzka, a Board-certified orthopedic surgeon, who found six percent permanent impairment of the left upper extremity utilizing the ROM method. Dr. Gritzka opined, however, that appellant's left wrist had not reached MMI as Dr. English had advised appellant that she would require additional surgery to address carpometacarpal (CMC) joint osteoarthritis of the left thumb. He found nine percent permanent impairment of the left lower extremity for primary knee osteoarthritis according to the Knee Regional Grid of the A.M.A., *Guides*. Alternatively, Dr. Gritzka found 10 percent permanent impairment of the left lower extremity for meniscal injury.

On October 1, 2019 OWCP referred the medical record and an updated SOAF to Dr. Katz for an impairment rating. In an October 9, 2019 report, Dr. Katz concurred with Dr. Gritzka's left upper extremity impairment rating of six percent. He opined, however, that the left lower extremity impairment should not be accepted as Dr. Gritzka did not provide radiographic evidence of primary knee joint arthritis.

By decision dated October 24, 2019, OWCP granted appellant a schedule award for six percent permanent impairment of the left upper extremity. The period of the award ran for 18.72

⁴ A.M.A., *Guides* (6th ed. 2009).

weeks for the period July 15 to November 23, 2019, based on Dr. Gritzka's July 15, 2019 report as reviewed by the DMA.

On November 1, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing, held on March 13, 2020 counsel asserted that OWCP failed to adjudicate the issue of left lower extremity impairment. He provided a September 17, 2019 report by Dr. Tyler J. Williams, Board-certified in emergency medicine, who noted that appellant underwent left medial collateral ligament repair in 2018. Dr. Williams obtained x-rays of the left knee, which demonstrated a small effusion and very mild osteoarthritis of the patellofemoral and medial compartments. He diagnosed a left knee strain.

On March 25, 2020 OWCP received a January 7, 2020 operative report by Dr. English of a left CMC arthroplasty, left thumb flexor carpi radialis (FCR) to abductor pollicis longus (APL) tendon transfer and left de Quervain's release. In a May 18, 2020 report, Dr. Nathan Hammell, a Board-certified orthopedic surgeon serving as DMA, opined that the January 7, 2020 surgery was unrelated to the accepted left upper extremity injury.

By decision dated May 27, 2020, the hearing representative affirmed the October 24, 2019 schedule award decision. She noted that Dr. Katz discussed Dr. Gritzka's left lower extremity impairment rating, but made no formal finding on left lower extremity impairment. The hearing representative did not address Dr. English's January 7, 2020 surgical report or Dr. Hammell's opinion. She commented that, although the record had been held open for 30 days following the March 13, 2020 hearing, no additional evidence was received pertinent to the schedule award claim.

The Board, having duly reviewed the case record submitted by OWCP, finds that this case is not in posture for decision.⁵

In its May 27, 2020 decision, an OWCP hearing representative affirmed an October 24, 2019 schedule award determination of six percent permanent impairment of the left upper extremity. The May 27, 2020 decision mentioned Dr. Gritzka's July 15, 2019 rating of six percent impairment of the left upper extremity, but did not reference his left lower extremity impairment rating. Also, the hearing representative did not reference Dr. English's January 7, 2020 operative note or mention Dr. Williams' September 17, 2019 report documenting osteoarthritis of the left knee.

The Board has held that OWCP should make its decision on the basis of all the evidence of record at the time of the decision.⁶ A decision that rests on only part of the evidence will be set

⁵ See *T.C.*, Docket No. 20-0618 (issued September 28, 2020); *K.F.*, Docket No. 19-088 (issued January 2, 2020); *J.J.*, Docket No. 13-1666 (issued August 18, 2014).

⁶ *D.G.*, Docket No. 17-0514 (issued May 4, 2018); *Jovita Weaver*, 2 ECAB 122 (1948).

aside.⁷ In the case of *William A. Couch*,⁸ OWCP had not reviewed medical evidence received prior to the issuance of its final decision which denied the claim.

The May 27, 2020 decision failed to address the medical evidence submitted relevant to the determination of the extent of appellant's permanent impairment. As such, the Board finds that OWCP has not reviewed medical evidence received prior to the issuance of its final decision which denied the claim. As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim which was properly submitted to OWCP prior to the time of issuance of its final decision be reviewed and addressed by OWCP.⁹

The Board finds, therefore, that this case is not in posture for decision, as OWCP did not address the above-noted evidence in its May 27, 2020 decision. On remand OWCP shall review all evidence of record and, following any further development as it deems necessary, it shall issue a *de novo* decision. Accordingly,

IT IS HEREBY ORDERED THAT the May 27, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

⁷ *L.T.*, Docket No. 19-0145 (issued June 3, 2019); *Marshall G. Wright*, 2 ECAB 182 (1949).

⁸ 41 ECAB 548 (1990).

⁹ *J.J.*, Docket No. 19-0448 (issued December 30, 2019); *see S.K.*, Docket No. 18-0478 (issued January 2, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004).

Issued: April 19, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board